BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY ANN FLETCHER Claimant VS. **U.S.D. #229** Respondent AND **KS. ASSOC. OF SCHOOL BOARDS** Insurance Carrier AND/OR **U.S.D. #229** Self-Insured Respondent	)	Docket Nos. 255,339; 1,016,137 & 1,020,473

ORDER

The self-insured respondent requests review of the May 10, 2006 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on August 29, 2006.

APPEARANCES

Michael A. Preston of Overland Park, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park appeared for the self-insured respondent, U.S.D. #299. Frederick J. Greenbaum of Kansas City, Kansas, appeared for U.S.D. #229 and Kansas Association of School Boards.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed there was no dispute with the ALJ's determination that claimant's last day worked was February 8, 2005.

ISSUES

It was undisputed claimant suffered repetitive trauma to her bilateral upper extremities as she performed her job duties as a custodian for respondent. As a result of her injuries the claimant had bilateral cubital tunnel release surgery and bilateral carpal tunnel release surgery. After the surgeries claimant returned to her custodial work without restrictions through her last day worked on February 8, 2005. As she continued working she experienced ongoing pain in her upper extremities and had additional medical treatment. Ultimately, her employment with respondent was terminated due to injuries she suffered in a car accident unrelated to her employment.

The claimant's date of accident was disputed, in part, because the respondent became self-insured effective July 1, 2004. Before that date the respondent was insured by the Kansas Association of School Boards Workers Compensation Fund, Inc. The Administrative Law Judge (ALJ) determined claimant's date of accident to be her last day worked on February 8, 2005. The ALJ further determined claimant was entitled to permanent partial disability compensation based upon a 14.5 percent whole person functional impairment.

The self-insured respondent requested review of the date of accident and nature and extent of claimant's disability. In its brief to the Board, the self-insured respondent also argues that claimant's average weekly wage should not be adjusted to include the value of her discontinued health insurance as such coverage was added to her husband's policy and he was also employed by respondent.

The respondent's insurance carrier requests the Board to affirm the ALJ's Award in all respects. The insurance carrier argues claimant continued to perform the same job without accommodation after her surgeries until her last day worked. And she continued to have symptoms and receive treatment for her upper extremity complaints. Consequently, the insurance carrier argues that case law supports a finding that the last day worked is the appropriate date of accident for claimant's upper extremity repetitive injuries.

The claimant requests the Board to affirm the ALJ's findings regarding the date of accident and claimant's average weekly wage for that date of accident. But claimant argues that her functional impairment should be increased to between 17 and 20 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Mary Fletcher worked as a custodian for Blue Valley School District for approximately 11 years. The last day she worked for respondent was February 8, 2005, due to injuries suffered in an automobile accident on February 9, 2005, which was unrelated to her employment.

She has not been able to return to work. Claimant's job duties included waxing, buffing, mopping and stripping floors as well as removing tables, desks, cleaning and building maintenance. These duties required repetitive use of her hands. She also used vibratory equipment such as a buffer. Claimant testified she began having tingling in her hands in 1998 or 1999. She told her supervisor, Bruce Wilson, about her hand problems. Claimant sought medical treatment on her own with her primary care physician. In May 2000, the respondent referred the claimant to Dr. John B. Moore IV. Diagnostic testing was performed and resulted in a negative finding. The claimant returned to work and experienced an increase in her symptoms. The claimant again saw Dr. Moore on October 1, 2002. Diagnostic testing was again performed but this time the result was a positive finding.

Dr. Moore performed a cubital tunnel release surgical procedure on December 4, 2002, to claimant's right elbow and then on January 8, 2003, to her left elbow. Physical therapy was ordered and claimant was released to return to work without restrictions in April 2003. After a few months of working her regular job duties, the claimant again began to experience problems with tingling, numbness, waking up at night and loss of strength in her hands. She testified that she advised her supervisor, Woody Colvin, about her hand problems.

Claimant was again examined and evaluated by Dr. Moore who diagnosed the claimant with carpal tunnel syndrome. On November 3, 2003, Dr. Moore performed bilateral carpal tunnel releases on both wrists. After surgery, the claimant was still having problems with her hands and she received some injections as well as physical therapy. Dr. Moore released the claimant to return to work with restrictions on April 2, 2004. Then on April 20, 2004, the claimant asked Dr. Moore to remove the restrictions. A functional capacity evaluation (FCE) was performed on May 11, 2004. Claimant returned to work performing the same duties. Again, the claimant began experiencing pain in her wrists. In November 2004, the claimant was treated with injections by hand specialist, Dr. Michael Hall. She continued to work with her ongoing symptoms until February 8, 2005.

The claimant last saw Dr. Moore on April 2, 2004, and in a letter dated April 20, 2004, the doctor opined claimant suffered a 9 percent whole person functional impairment based upon the AMA *Guides*[1]. The doctor noted that claimant's rating would have been

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

17 percent but he reduced his rating because her grip strength testing indicated symptom magnification on 2 of 4 tests.

On July 19, 2004, the claimant was examined and evaluated by Dr. Edward J. Prostic at her attorney's request. Based upon the AMA *Guides*, Dr. Prostic opined claimant suffered a 20 percent whole person functional impairment.

The claimant neither alleged nor presented evidence to establish she was entitled to a work disability. Consequently, claimant's permanent partial disability is limited to her functional impairment. Functional impairment is defined by K.S.A. 44-510e(a), as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[2] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.[3]

Dr. Moore rated claimant with a 17 percent whole person functional impairment but reduced his rating to 9 percent because he concluded claimant had exhibited symptom magnification in 2 of 4 grip strength tests. However, the doctor agreed that during his extensive treatment of claimant he never made a diagnosis of symptom magnification. Moreover, claimant demonstrated a normal bell curve with her grip strength testing and it was only on the rapid exchange grip strength testing that the invalid results were obtained. And claimant's functional capacity evaluation, performed after Dr. Moore's testing, indicated claimant gave consistent effort during testing. Finally, Dr. Moore agreed it would be unusual for a symptom magnifier to request her restrictions be removed so she could return to work. The Board finds Dr. Moore's 17 percent rating more accurately reflects claimant's impairment than the reduced 9 percent rating based upon alleged symptom magnification.

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[2] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dr. Prostic rated claimant with a 20 percent whole person functional impairment. Dr. Moore rated claimant with a 17 percent whole person functional impairment. The Board finds claimant suffers an 18.5 percent whole person functional impairment.

According to the principles set forth in *Treaster*[4], the appropriate date of accident for this series of repetitive mini-traumas is the last day worked on February 8, 2005. In *Treaster*, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*[5], in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[6]

To the extent determination of this date of accident may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence.

> We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The

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[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[5] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[6] *Treaster*, Syl. ¶ 4.

> actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry.[7]

The Board concludes that claimant suffered additional aggravation to her upper extremities each time she returned to the same job she had performed before her various treatments and surgeries. Because claimant continued to aggravate her condition after each surgery, the last day worked rule is applicable.[8] The Board further determines that each insurance carrier is responsible for payment of the benefits incurred during its period of coverage such as medical expenses or temporary total disability compensation benefits.[9]

Finally, the self-insured respondent argues that the value of claimant's health insurance benefits should not be included in the computation of her average weekly wage. This argument is premised on the fact that after such benefits were terminated for claimant, she was included on her husband's health insurance policy. And he happens to be employed by respondent.

The Board finds this argument disingenuous and without merit. K.S.A. 2004 Supp. 44-511(a)(2)(E) provides that when employer provided health insurance is discontinued the average weekly wage shall be recalculated to include the value of the discontinued benefit. There is no dispute the claimant's health insurance benefit was discontinued and pursuant to statute the claimant is entitled to a recalculation of her average weekly wage to include the value of her discontinued benefit.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 10, 2006, is modified to find claimant is entitled to permanent partial disability benefits for an 18.5 percent whole person functional impairment and is affirmed in all other respects.

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[7] *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[8] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[9] *Id.* at Syl. ¶ 9.

The claimant is entitled to 13.43 weeks of temporary total disability compensation at the rate of $259.73 per week or $3,488.17 which is ordered paid by the respondent and insurance carrier, Kansas Association of School Boards Workers Compensation Fund.

The claimant is also entitled to 76.78 weeks of permanent partial disability compensation at the rate of $353.52 per week or $27,143.27 for a 18.50 percent functional disability, making a total award of $30,631.44, which is ordered paid by the self-insured respondent.

IT IS SO ORDERED.

Dated this _____ day of September 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael A. Preston, Attorney for Claimant
Frederick J. Greenbaum, Attorney for U.S.D. #229 & KASB
Christopher J. McCurdy, Attorney for U.S.D. #229